84-756 (1)

No.____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BETTY MOORE,

Petitioner,

—against—

GENERAL MOTORS CORPORATION,

Respondent.

PETITION OF BETTY MOORE FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LAWRENCE O. WILLBRAND, P.C.
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St. Louis, Missouri 63101
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Attorney for Petitioner

42 pp

QUESTIONS PRESENTED FOR REVIEW

1. Has the national labor law policies pre-empted causes of action premised on *fraudulent* and *intentional* misrepresentation by an employer to a laid-off employee that the employee in St. Louis, Missouri, may shortly commence a new job in Bowling Green, Kentucky, to the damage of the employee who sold her home in St. Louis at a loss and lost her down payment on a house in Kentucky?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITION OF BETTY MOORE FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DECISIONS BELOW

The U.S. Magistrate of the Eastern District of Missouri dismissed the Complaint on February 1, 1983, on the grounds that the cause was pre-empted by the national law and policy relating to labor.

The United States Court of Appeals with dissenting opinion affirmed on June 29, 1984.

Appellant's Petition For Rehearing En Banc was denied by a four to four divided court on August 17, 1984, for the reason that there was a lack of a majority. The Chief Judge "would have granted" the said Petition.

Decisions are appended hereto.

JURISDICTION

The trial court entered summary judgment dismissing the Complaint on February 4, 1983; the United States Court of Appeals For The Eighth Circuit affirmed on June 29, 1984, with dissenting opinion.

Appellant's Motion For Rehearing En Banc was denied on August 17, 1984, by a vote of four to four.

It is suggested that this Honorable Court has jurisdiction pursuant to *28 U.S.C.A. Section 1254 (1).*

ISSUE AND STATUTE INVOLVED

Whether the federal labor law allows an employer license to *fraudulently* injure an employee with impunity from the state tort law upon the theory of pre-emption.

The *National Labor Relations Act, 29 U.S.C. Section 151 et seq.*, is alledgedly involved.

STATEMENT OF THE CASE

Betty Moore was employed by General Motors Corporation for a period of years in St. Louis, Missouri, and was then "laid-off" for many months.

She was invited to accept a position on the new second shift in Bowling Green, Kentucky, by the defendant-employer to report for work within forty days. She immediately accepted.

According to exhibits produced by the employer the decision to create a second shift in Bowling Green, Kentucky, had been postponed to a later date at the very time that the employer had instructed the plaintiff to report for work in said State.

Plaintiff was a widow with a child and immediately sold her home and its contents at a loss of about $12,500.00 and placed a sizable down payment on a home in Kentucky which she also lost.

Subsequent to the purchase of a new home in Kentucky on the day she reported to work she was advised that the plan for a second shift had been canceled and it was never commenced.

REASONS FOR GRANTING THE WRIT

A. The decisions of the court below have exceeded the intentions of the Supreme Court as to what matters are preempted by the national labor law policies.

The instant cause of action is premised on fraud and negligent misrepresentation. The latter is a recognized theory in Missouri. The fraud is premised on knowingly misrepresentating a material fact.

The majority decision of the United States Court of Appeals held that the conduct of the employer is within the compass of activities that states may not regulate and the cause of action arose from the employment contract.

The instant causes of action are premised on conduct aside from the employment contract which merely provided the occasion.

The alleged fraud is premised on misrepresentation which in this situation was intentional. That the subject of the misrepresentation was employment does not support the contention that the matter "arose" from the collective bargaining agreement.

If an employee embezzles from the employer he is still punished by the State law.

In *Sears, Roebuck & Company v. San Diego County District Council of Carpenters,* 436 U.S. 180, (1978), the United States Supreme Court in speaking of *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, found that trespass by Union pickets was not an act pre-empted by national labor laws and upon which defendant relies, the Court said: (p. 188)

> ". . . the history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such jurisdiction bar on the various interests affected." As the Court noted last term: 'Our cases indicate . . . that inflexible application of the doctrine is to be avoided, especially where State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue influence with the federal regulatory scheme' *Farmer v. Carpenters,* 403 U.S. 290, 302. In *Farmer,* infra, the Court said that:
>
> ". . . the Court has been unwilling to 'declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employers, employees and unions . . . ' " (p. 295-296).
>
> In *Sears,* the Court said: (p. 188) "Thus the Court has refused to apply the *Garmon* guidelines in a literal, mechanical fashion."

The *Sears* case appears to be a thorough review of the pre-emption doctrine up to 1978.

In *Farmer v. Carpenters*, 430 U.S. 290, (1976), a member and officer of the Union brought a tort action against the Union for intentional outrageous conduct concerning threats, intimidation and conduct thereby causing his emotional distress.

The Supreme Court observed that the potential for interference with the federal scheme by the State cause of action is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens, since the State tort action can be resolved without reference to any accommodation of the special interests of unions and members in the hiring hall context.

In *Farmer's*, the Court stated that the dispute therein could be resolved in state court "without resolution of the 'merits' of the underlying labor dispute" (p. 304).

In the case at bar there is no labor dispute relating to the ordinary problems in running a plant but rather relating to shocking negligent or intentional conduct reflecting a gross disregard for the loss inflicted on an individual who was in effect being offered out-of-state employment.

In *Farmer's*, the Court said:

". . . the tort action can be resolved without reference to any accommodation of the special interests of unions and members in the hiring hall context" (p. 305).

In *Farmer's*, the Court said:

"On balance we cannot conclude that Congress intended to oust state-court jurisdiction over actions fortuitous activity such as that alleged in this case. At the same time, we reiterate that concurrent state-court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme" (p. 305).

The dissenting opinion of the United States Court of Appeals, For The Eighth Circuit in the instant case stated:

"I would hold GM answerable under state tort law. An action brought under state law by an employee to redress loss caused by the employer's false representation will not interfere with the effective administration of the national labor policy."

The pre-emption of the national labor laws is determined on a case by case basis.

There is no prior case uncovered by plaintiff or the Court of Appeals which has ventured to hold that intentional fraudulent conduct is not to be redressed by the state court but is rather pre-empted by national labor law.

Conversely, malicious libel was held to be of peripheral concern and not pre-empted in *Linn v. United Plant Guard Workers,* 383 U.S. 53 (1966).

It is respectfully submitted that the instant holding is chartering a course on waters not intended by the United States Supreme Court.

CONCLUSION

THE COURT BELOW HAS EXPANDED THE THEORY OF PRE-EMPTION AND HAS ESTABLISHED PRECEDENT BEYOND THAT CONTEMPLATED BY DECISIONS OF THE SUPREME COURT WHICH HAS INDICATED THAT THESE MATTERS MUST BE DETERMINED ON A CASE-BY-CASE METHOD.

Respectfully submitted,
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APPENDICES

APPENDIX A

FOUR TO FOUR DECISION OF THE UNITED STATES COURT OF APPEALS DENYING MOTION FOR REHEARING EN BANC

UNITED STATE COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1295-EM — September Term, 1983

BETTY MOORE, *Appellant,* vs. GENERAL MOTORS CORPORATION, *Appellee.*) Appeal from the United States District Court for the Eastern Division of Missouri.

The Petition of appellant for rehearing en banc is denied for the reason that the majority of the active judges on the Court have failed to vote in favor of the petition.

Judges Heaney, Ross, Gibson and Bowman voted to deny the petition. Chief Judge Lay and Judges Bright, McMillian and Fagg would have granted the petition. Judge Arnold did not participate.

The petition for rehearing by the panel is also denied.

August 17, 1984

APPENDIX B

Decision of the United States Court of Appeals With Dissenting Opinion

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1295

BETTY MOORE,	)	
	)	Appeal from the
Appellant,	)	United States
	)	District Court
vs.	)	for the Eastern
	)	District of
GENERAL MOTORS	)	Missouri.
CORPORATION,	)	
	)	
Appellee.	)	

Submitted: November 17, 1983

Filed: June 29, 1984

Before:

JOHN R. GIBSON and FAGG, Circuit Judges, and HUNTER, Senior District Judge.*

JOHN R. GIBSON, Circuit Judge

Betty Moore appeals from dismissal for lack of jurisdiction of her claim against General Motors Corporation based on negligent misrepresentation and fraud. She was a laid-off employee of the General Motors Plant in St. Louis and was offered employment at a new plant in Bowling Green, Kentucky. Her instructions to report to work at Bowling Green on September 8, 1981, were withdrawn, but in the meantime she had sold her house in St. Louis, bought another in Bowling Green, and as a result of damages resulting from these transactions, brought the action against General Motors. On appeal she argues that her claims under state law for fraud and misrepresentation are not preempted by national labor law. We affirm the judgment of the district court. *

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*The Honorable Elmo B. Hunter, Senior District Judge for the Western District of Missouri, sitting by designation.

Moore brought this action against General Motors claiming breach of contract and negligence in its actions concerning her transfer to the Bowling Green plant. Moore contends that the provisions of the Collective Bargaining Agreement dealing with transfer to a new plant created a duty to conduct such transfer with due care. She alleges that in order to report for work at the new plant, she sold her home in St. Louis at a $10,000.00 loss and its contents at a $2,500.00 loss, and contracted to buy a house in Bowling Green. However, when she reported for work on September 8, 1981, there was no work for her at the Bowling Green plant.

The case was set for trial and GM renewed its motion for summary judgment and to dismiss,[2] arguing that the court was without subject matter jurisdiction because plaintiff's claims arose in the context of the employment relationship and were governed by the Collective Bargaining Agreement. Therefore the claims asserted would be preempted by national labor law and policy. Moore then filed an amended complaint realleging the claims of negligent misrepresentation and adding a count based on fraud which alleged that GM falsely represented to Moore that she would be employed on a second shift in the Bowling Green plant at a time when they knew there would not yet be a second shift.

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*The Honorable David D. Noce, United States Magistrate for the Eastern District of Missouri, heard the case pursuant to 28 U.S.C. § 636 (c) (1982).

The affidavits filed in support of the motion for summary judgment claim that the transfer of Corvette production from St. Louis to Bowling Green was a transfer of major operations within the meaning of the labor contract, and that GM and the Union[3] had entered into a Memorandum of Understanding which allowed St. Louis plant employees to be eligible to apply for transfer to the Bowling Green Plant.[4] The Memorandum of Understanding between GM and the Union provided that the Collective Bargaining Agreement applied to the Bowling Green plant, provided for the application of various procedures, including grievance procedures, and specified the application procedures to be followed by St. Louis employees.

GM had sought applications from both active and laid-off employees of the St. Louis Plant, and on October 24, 1980, had received Betty Moore's application for transfer to Bowling Green. Moore had been laid-off for 18 months. On June 30, 1981, a letter was sent to Moore offering her employment at Bowling Green, and on July 2, 1981, she signed acceptance of the letter and delivered it to the employment office in St. Louis. She reported for a physical examination on July 29, 1981, and on that date was told to report to Bowling Green on September 8, 1981, at 7:30 A.M.

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[3]GM had previously filed a motion for summary judgment on the ground that Moore was asserting a claim for breach of a contract that provided for a grievance and arbitration procedure which she had not exhausted. The district court denied the motion, holding that Moore's complaint stated a claim of negligent misrepresentation rather than a claim for breach of contract.

"'Union" refers to the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America of which Betty Moore is a member.

'Paragraph 96 of the Collective Bargaining Agreement states:

> When there is a transfer of major operations between plants, the case may be presented to the corporation and, after investigation, it will be reviewed with the International Union in an effort to negotiate an equitable solution, in accordance with the principles set forth in previous paragraph. Any transfer of employees resulting from this review shall be on the basis that such employees are transferred with full seniority except as the parties may otherwise mutually agree.

The paragraph goes on to provide for a relocation allowance for employees whose seniority is transferred between plants.

On July 23, 1981, GM delayed its decision concerning whether to add a second shift until its August meeting. On August 18, 1981, the GM production scheduling committee met and determined that the second shift production at Bowling Green should be postpone. The following day a mailgram was sent to Moore informing her that the second shift production at Bowling Green would be postpone until January 1, 1982, and that she should not report to work on September 8. A return receipt for the mailgram was signed by Moore August 25, 1982. Moore was eventually notified to report to Bowling Green on June 7, 1982, and at her request this date was postpone until June 14 when she commenced work at Bowling Green. Moore received $1,240.00 in relocation benefits as provided under the Collective Bargaining Agreement.

In ruling on the Motion to Reconsider, the Magistrate pointed out that Moore, although given specific leave to amend her complaint to allege a claim under 29 U.S.C. § 185(a) (1982) for breach of the Collective Bargaining Agreement, did not make that amendment and did not allege compliance with the requirements of the Collective Bargaining Agreement in regard to the grievance procedure set forth in the Agreement. The Magistrate pointed to the broad scope of the Collective Bargaining Agreement[3] which provided that the ultimate grievance procedure decision is final and binding on the Union, its members, the employee and the employer. The Magistrate held that the grievance procedure was mandatory and that Moore had failed to exhaust those procedures. He concluded that state law must yield to the application of national labor law and, accordingly, the court was without jurisdiction to consider the common law claims.

Moore asserts that her claims are not preempted. While her right to insist on an available job being offered to her was federally protected, she claims that the negligence or fraud in doing so in the fashion alleged should not be protected. She relies upon *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters,* 436 U.S. 180 (1978), in which a trespass by union pickets was found not to be preempted by federal labor laws, and *Farmer v. United Brotherhood of Carpenters,* 430 U.S. 290 (1977), in which a claim for intentional outrageous conduct was allowed under state laws. She further argues that her claim of malicious fraud is similar to the malicious libel claim in *Linn v. United Plant Guard Workers,* 383 U.S. 53 (1966), which was held to be a matter of peripheral concern only.

The Magistrate correctly ruled that federal labor law preempts. When state law is invoked to regulate activities which are the subject of a collective bargaining agreement, the national labor policy requires that state law yield to the application of national labor law. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243-45 (1959). The principle of preemption in the national labor field operates to delimit state and federal judicial authority over labor disputes in order to avoid conflict between the exertion of judicial and administrative power, thereby providing for uniformity and stability in the resolution of labor relations conflicts. *Amalgamated Association of Motor Coach Employees v. Lockridge*, 403 U.S. 274, 286 (1971).

To achieve uniform federal regulation, Congress enacted the National Labor Relations Act, 29 U.S.C. § 151 et seq., intending to replace inconsistent state laws with a uniform national labor policy.[4] In *Garmon* the Supreme Court set forth the guidelines to be followed in applying federal labor law preemption. The Supreme Court held that state jurisdiction must yield to the primary jurisdiction of the National Labor Relations Board when conduct is arguably or potentially subject to the National Labor Relations Act, either as protected activity under section 157 or an unfair labor practice under section 158. If conduct is potentially subject to the National Labor Relations Act, state regulation is precluded regardless of the remedies sought.

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[4]S. Rep. No. 573, 74th Cong., 1st Sess. 15 (1935).

[2]Paragraph 28 of the Collective Bargaining Agreement provides:

Any employee having a grievance, or one designated member of a group having a grievance should first take the grievance up with the foreman who will attempt to adjust it.

Paragraph 55 of the Agreement provides:

Any issue involving the interpretation and/or the application of any term of this Agreement may be initiated by either party directly with the other party. Upon failure of the parties to agree with respect to the correct interpretation or application of the Agreement to the issue, it may then be appealed directly to the Umpire as provided in paragraph (43).

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act [29 U.S.C. § 157] or constitute an unfair labor practice under § 8 [29 U.S.C. § 158], due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the states have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.

At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8, or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board.

359 U.S. at 244-45 (footnotes omitted).

The conduct of GM about which Moore complains is within the compass of activities that states may not regulate. "Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." *Garmon,* 359 U.S. at 247. Moore's complaint essentially arises from an employment contract between her and GM that was entered into pursuant to an agreement between GM and the Union. THe conduct of GM in relation to a matter of employment is arguably protected or prohibited by sections 157 and 158.

As set out in *Garmon,* there are two exceptions to the federal pre-emption doctrine: (1) conduct that is merely a peripheral concern of the Labor Management Relations Act, 29 U.S.C. § et seq., and (2) conduct that touches interests deeply rooted in local feeling and responsibility. Moore argues that GM's conduct falls within these exceptions. In making her argument, Moore relies on three United States Supreme Court cases. *Farmer,* 430 U.S. 290, and *Linn,* 383 U.S. 53, are both state tort law cases in which the Supreme Court found that the state's special interest in protecting the health and safety of its citizens and preserving public order was sufficiently compelling to merit exception from federal preemption.

The decision to preempt federal and state court jurisdiction over a given class of cases depends on the nature of the particular interest being asserted and the effect of concurrent judicial and administrative remedies upon the administration of national labor policies. *Vaca v. Sipes*, 386 U.S. 171, 180 (1967). The Supreme Court has refused to apply the preemption doctrine in cases involving violent tortious activity. *International Union, United Automobile Workers v. Russell*, 356 U.S. 634, 649 (1958).

> [S]tate court actions to redress injuries caused by violence or threats of violence are consistent with effective administration of the federal scheme: Such actions can be adjudicated without regard to the merits of the underlying labor controversy.

Farmer, 430 U.S. at 299-300. *See also Russell*, 356 U.S. at 649 (Warren, C.J., dissenting). Unlike the conduct complained of in *Russell* (threats of violence), *Linn* (malicious libel), and *Farmer* (intentional infliction of emotional distress), Moore's complaint does not involve outrageous or violent conduct, and the damages which Moore alleges she suffered were at least partially a result of her personal reaction to the transfer. The tortious conduct alleged to have been committed in this case involves Moore's right of transfer to the new plant in Bowling Green. This right evolves from the Collective Bargaining Agreement and the Memorandum of Understanding between the Union and GM, which is governed by federal law, not state tort law.

The subject matter of Moore's amended complaint is not "merely peripheral" to the labor dispute out of which this case arises. The entire nature of the controversy arises from a transfer that was provided for generally in the Collective Bargaining Agreement, and specifically, in the Memorandum of Understanding between the Union and GM. Moore's claim that it was GM's failure to make the transfer with due care only confirms the inseparable relationship between the transfer and the Collective Bargaining Agreement.

Moore's reliance on *Sears, supra,* is also misplaced. The Court decided not to apply the federal preemption doctrine in *Sears* because if applied in that particular situation, the employer would have been denied access to any forum in which to litigate the disputed conduct. 436 U.S. at 206-07. Such is not the case here.

Under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), union members may bring an action in the federal district court for breach of a collective bargaining agreement even where the conduct alleged was arguably protected or prohibited by the National Labor Relations Act. *Lockridge,* 403 U.S. at 298-99. Although given leave to amend her complaint to state a claim under the Collective Bargaining Agreement, Moore did not do so, but rather filed an additional claim alleging common law fraud. Moore has attempted to characterize her claims as a tort action rather than a violation of the Collective Bargaining Agreement; however, we agree with the district court's conclusion that the rights on which Moore bases her claims arise from the Collective Bargaining Agreement.

All rights and claims arising from a collective bargaining agreement in an industry affecting interstate commerce are governed by federal law. State law does not exist as an independent source of private rights to enforce collective bargaining contracts. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). That the application of federal preemption cannot be avoided by attempts to allege only state contract or tort theories was recently made clear in a Third Circuit case in which the Court stated:

> [S]ection 301(a) . . . reaches not only suits *on* labor contracts, but suits seeking remedies *for violation* of such contracts. . . . The issue is not the nature of the remedy sought for the alleged violation, but whether the remedy sought may require that the court from which it is sought, . . . interpret a collective bargaining agreement. . . . All suits for violation of collective bargaining agreements are governed by federal law, because Congress intended that the scope of obligation in labor contracts in or affecting interstate commerce be uniform.

Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120, 647 F.2d 372, 380 (3d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) (emphasis is original) (citations omitted).

The Collective Bargaining Agreement from which Moore's transfer rights arise, requires that Moore resort to the grievance procedures set forth in the Agreement. As the Magistrate noted, Moore has never alleged compliance with those procedures. Failure to exhaust the grievance procedures of the collective bargaining agreement is a defense to a suit on the collective bargaining agreement. *Hines v. Anchor Motor Freight Inc.*, 424 U.S. 554, 562 (1976); *Vaca v. Sipes*, 386 U.S. at 184. An action for state common law claims will not be allowed against an employer where the employee has failed to proceed with the remedies provided in the collective bargaining agreement.

Moore's action is preempted by federal labor law. Therefore, we hold that the court was without subject matter jurisdiction and properly dismissed her action. The judgment of the district court is affirmed.

FAGG, Circuit Judge, dissenting.

The national labor policy considerations which underlie the cases cited by the court do not support the result is has reached. I do not believe that federal labor law gives GM license fraudulently to injure an employee with impunity from the control of state tort law.

Almost four weeks after Moore accepted GM's offer of employment, GM galsely represented the date when she was to start work, a starting date known by it to be false. In reliance upon GM's representation Moore sold one home at a sacrifice and lost her down payment on another. GM's conduct is not free from the application of state law. States have a deeply rooted interest in protecting their citizens from fraudulent conduct and, unlike the federal scheme, state remedies have been designed to compensate for the kind of economic loss suffered by Moore.

I would hold GM answerable under statye tort law. an action brought under state law by an employee to redress loss caused by the employer's false representation will not interfere with the effective administration of the national labor policy. The doctrine of premption is not applicable here. I would reverse.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,

EIGHTH CIRCUIT.

APENDIX C

ORDER AND MEMORANDUM OF UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BETTY MOORE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 82-203 C(4)
	)	
GENERAL MOTORS CORPORATION, a corporation,	)	
	)	
Defendant.	)	

ORDER

In accordance with the Memorandum of the undersigned United States Magistrate filed herewith,

IT IS HEREBY ORDERED that the motion of defendant General Motors Corporation to dismiss Count III of the amended complaint be and it is sustained.

IT IS FURTHER ORDERED that the motion of defendant General Motors Corporation for summary judgment be and it is sustained. The action is dismissed.

DAVID D. NOCE

UNITED STATES MAGISTRATE

Dated this 4th day of February, 1983.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BETTY MOORE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 82-203 C(4)
	)	
GENERAL MOTORS CORPORATION, a corporation,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM,

This matter is before the Court upon the motions of defendant General Motors Corporation (a) to reconsider its prior motion for summary judgment and to dismiss for lack of subject matter jurisdiction (filed December 8, 1982); and (b) to dismiss Count III of the amended complaint (filed January 8, 1983).

Plaintiff Betty Moore commenced this action in the Circuit Court of the City of St. Louis. Defendant removed the action to this Court because of the diversity of the parties' citizenship and the amount in controversy. 28 U.S.C. §§ 1332, 1441(a).

In her original petition plaintiff alleged that for many years before July 29, 1981, she was employed by defendant in St. Louis, Missouri. After that date she was laid off.

Pursuant to the collective bargaining agreement between defendant and plaintiff's union, defendant agreed to give preference to laid off employees for work in a new plant or in a plant to which operations were transferred. Plaintiff alleged that on July 29, 1981, she was transferred to and was offered employment in a new plant in Bowling Green, Kentucky, by defendant. She accepted the offer and was told to report for work there on September 8, 1981. Plaintiff alleged that, in order to report for work in the new plant, she sold her home in St. Louis at a $10,000 loss and sold the contents of her home for a $2,500 loss. She further alleged that she sought to purchase a home in Bowling Green and the home seller contacted defendant on August 15, 1981 to verify plaintiff's employment there on September 8. Plaintiff alleged that defendant verified such employment to the home seller and, as a result of which, plaintiff purchased the home. She alleged that when she reported for work on September 8, 1981, there was no work for her.

In the original petition plaintiff alleged that defendant acted negligently as follows:

(a) Defendant negligently promised and held out to plaintiff that employment was to be held on September 8, 1981, in Bowling Green, Kentucky, when defendant knew or should have known that said employment would not be available.

(b) Defendant negligently induced plaintiff to relocate by representing that said employment would be definitely available when defendant knew or should have known that said employment might not be available.

(c) Defendant negligently verified employment as late as August 15, 1981, at a time when defendant knew or should have known that employment was not certain and not available.

(d) Defendant negligently failed to warn plaintiff that there might not be employment at a time when defendant knew or should have known that there might not be such employment.

(Petition p. 2) In Count I of the petition plaintiff sought recovery for the losses she sustained by the sale of her home and the contents of her home in St. Louis, the down payment on the Kentucky house which she then expeced to lose for failure to make the payments, and mental suffering. In Count II plaintiff sought recovery of lost wages and retirement benefits.

On July 23, 1982 defendant moved for summary judgment on the ground that (1) plaintiff failed to exhaust the grievance and arbitration procedures provided in the collective bargaining agreement upon which she based her right to the transfer for work in Kentucky; (2) the subject collective bargaining agreement did not require defendant to transfer an employee "with due care;" and (3) assuming defendant had a duty to transfer plaintiff with due care, defendant did not breach that duty.

On September 20, 1982, the undersigned denied defendant's motion for summary judgment. The Court then held that plaintiff's petition did not alleged a claim for breach of contract, but rather stated a claim of the tort of negligent misrepresentation set forth in §552, Restatement of Torts, Second. The undersigned determined that the state courts of Missouri have recognized such a cause of action. Therefore, the undersigned held that defendant's contractual defenses were irrelevant.

On December 8, 1982, the date set for trial, defendant moved for reconsideration of its motion for summary judgment and to dismiss. At this time defendant argued that the Court was without subject matter jurisdiction over the action, because plaintiff's claim arose in the context of her employment relationship which was governed by the collective bargaining agreement, and Missouri state law was preempted by the national labor law and policy. Defendant argued that plaintiff's sole and exclusive remedies are under the collective bargaining agreement or within the jurisdiction of the National Labor Relations Board. In opposition to this motion plaintiff argues that this case involves no labor dispute, the case will not realistically interfere with federal labor regulation, and the circumstances of this case are an exception to the preemption doctrine. Rather than require the parties to try the case in the face of these important jurisdictional issues, the Court granted plaintiff leave to respond to defendant's motion in writing and to file an amended pleading. The Court believed that these legal issues should be resolved on appeal before a trial is held.

On December 17, 1982, plaintiff filed her first amended complaint. In Count I plaintiff alleges that defendant made negligent misrepresentation to her:

(a) Defendant negligently represented that plaintiff would certainly commence employment in Bowling Green, Kentucky, at a time when defendant knew that it was not certain that plaintiff would do so.

(b) Defendant negligently failed to warn plaintiff that the represented employment was not certain or might not be available at a time when defendant knew that said employment was not certain and might not be available.

Amended Complaint, p. 2, par. 8. In Count II plaintiff seeks recovery of lost wages. In Count III plaintiff for the first time alleges fraud: On July 29, 1981, defendant by and through its agents, servants, and employees falsely represented to plaintiff in St. Louis, Missouri, that plaintiff was employed on the second shift in Bowling Green, Kentucky; at the said time defendant knew the representation was false or did not know whether the representation was true or false; in doing so defendant intended that plaintiff rely upon said representation; the representation was material; plaintiff did rely upon said representation and did not know that the representation was false or that defendant did not know whether the representation was true or false; plaintiff had a right to rely on said representation. *Id.*, p. 3, par. 2. Plaintiff seeks actual and punitive damages.

On January 7, 1983, defendant moved to dismiss Count III of plaintiff's amended complaint, arguing that plaintiff failed to plead a claim for breach of the collective bargaining agreement under §301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185; that plaintiff failed to plead fraud with particularity as required by Rule 9(b), Federal Rule of Civil Procedure; and the fraud claim is preempted by the national labor law.

The Court believes that defendant's motions must be sustained, because in this action state law is preempted by federal labor law; in order to state a claim for relief under federal labor law plaintiff must bring her action under the collective bargaining agreement and 29 U.S.C. §185(a). Plaintiff has failed to state a claim under 29 U.S.C. §185(a).

In support of its original motion for summary judgment, defendant filed the affidavits of Richard L. Scheid, its hourly personnel department supervisor of employment. In his affidavit Richard Scheid stated that plaintiff is a member of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") in connection with her employment with defendant. Plaintiff's employment was under the terms of the collective bargaining agreement between defendant and the UAW, dated September 14, 1979, effective October 1, 1979, for a three year period. This collective bargaining agreement is attached as Exhibit No. 1 to the motion. He further stated in his affidavit that paragraph 96 of the collective bargaining agreement provides for the rights and obligations of the parties to the agreement when a transfer of major operations between plants occurs. The transfer of Corvette production from St. Louis, Missouri, to Bowling Green, Kentucky, was a transfer of major operations within the meaning of paragraph 96 of the collective bargaining agreement. On December 4, 1980, defendant and the UAW entered a memorandum of understanding which allowed St. Louis plant employees, including plaintiff, to be eligible to apply for transfer to the defendant's Bowling Green plant under paragraph 96 of the collective bargaining agreement.

The Court believes that the state law claims of negligent misrepresentation and fraud made by plaintiff in her complaint are matters arising within the subject matter of her employment relationship with defendant, her union membership, and the subject matter of paragraph 96 of the collective bargaining agreement which provides as follows:

(96) *When there is a* transfer of major operations between plants, the case may be presented to the Corporation and, after investigation, it will be reviewed with the International Union in an effort to negotiate an equitable solution, in accordance with the principles set forth in the previous paragraph. Any transfer of employees resulting from this review shall be on the basis that such employees are transferred with full seniority *except as the parties may otherwise mutually agree.*

(96a) (1) An employee whose seniority is transferred between General Motors plants pursuant to Paragraph (96) of this agreement, will be paid a Relocation Allowance, provided:

(a) The plant to which the employee is to be relocated is at least 50 miles from the plant from which his seniority was transferred, and

(b) As a result of such relocation he changes his permanent residence, and

(c) He makes application within six (6) months after commencement of employment at the plant to which he was relocated in accordance to the procedures established by the Corporation.

(2) The amount of the Relocation Allowance will be determined as follows:

* * *

(3) In the event an employee who is eligible to receive Relocation Allowance under these provisions is also eligible to receive a relocation allowance or its equivalent under any present or future Federal or State legislation, the amount or Relocation Allowance provided under this Paragraph (96) when added to the amount or relocation allowance provided by such legislation, shall not exceed the maximum amount of the Relocation Allowance the employee is eligible to receive under the provisions of this paragraph.

(4) Only one Relocation Allowance will be paid where more than one member of a family living in the same residence are relocated pursuant to Paragraph (96).

(Exhibit No. 1 to Motion for Summary Judgment, pp. 69-71.) The Court understands that plaintiff is not claiming damages for breach of contract (she received a relocation allowance), but that her claims sound in tort. Nevertheless, the Court further understands that the circumstances of her claims arose within the context of the execution of the collective bargaining agreement in effecting the transfer of operations and in processing plaintiff's application for work at the Bowling Green plant.

When state law is invoked to regulate activities which are the subject matter of a collective bargaining agreement, the national labor policy requires that state law yield to the application of national labor law. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243-45 (1959); *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 657 (1965); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102-103 (1962); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980); *Ramsey v. Signal Delivery Service*, 631 F.2d 1210, 1212 (5th Cir. 1980); *Sklios v. Teamsters*, 503 F.Supp. 123, 124 (N.D. Cal. 1980); *Teamsters v. Fargo-Moorehead Auto Dealers*, 459 F.Supp. 558, 560 (D. N.D. 1978); *Richardson v. Communication Workers*, 267 F.Supp. 403, 405 (D. Neb. 1967), *reversed on other grounds*, 443 F.2d 974 (8th Cir. 1971); *of., Helton v. Hake*, 386 F. Supp. 1027 (W.D. Mo. 1974); *Helton v. Hake*, 98 L.R.R.M. 2905 (Mo. App. 1978). Union members, such as plaintiff, may bring an action in the District Court under 29 U.S.C. §185(a) for breach of the collective bargaining agreement. *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 298-299 (1964).

On December 8, 1982, the Court granted plaintiff leave to amend her complaint. However, plaintiff did not bring a claim under 29 U.S.C. §185(a) for breach of the collective bargaining agreement, but rather filed an additional claim for common law fraud under the law of Missouri. Subject matter jurisdiction for plaintiff's state law claims exists only under 28 U.S.C. §1332.

The record of this action is clear that plaintiff has not alleged compliance with the requirements of the collective bargaining agreement that she submit to the grievance procedure set forth in the agreement. *See* Exhibit No. 1 to Motion for Summary Judgment, paras. 28-55.

The scope of matters arbitrable under the collective bargaining agreement is very broad and resort to the grievance procedure is required to resolve arbitrable issues. Paragraph 28 of the collective bargaining agreement as follows:

> Any employee having a grievance, or one designated member of a group having a grievance should first take the grievance up with the foreman who will attempt to adjust it.

Id., p. 26. Paragraph 55 of the collective bargaining agreement provides as follows:

> (55) Any issue involving the interpretation and/or the application of any term of this Agreement may be initiated by either party directly with the other party. Upon failure of the parties to agree with respect to the correct interpretation or application of the Agreement to the issue, it may then be appealed directly to the Umpire as provided in paragraph (43).

Id., p. 42. The collective bargaining agreement also provides that the ultimate grievance procedure decision is final and binding on the union, its members, the employee, and the employer. *Id.*, p. 41, Para. 53.

The national labor policy is one committed to the enforcement of arbitration provisions in collective bargaining agreements. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); *United Steel Workers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960); *United Steel Workers of America v. American Manufacturing Company*, 363 U.S. 564 (1960). It is clear that arbitration provisions in a collective bargaining agreement are to be given broad and liberal construction. *Bonnot v. Congress of Independent Unions, Local No. 14*, 331 F. 2d 355 (8th Cir. 1964). The Court is satisfied that the collective bargaining agreement under which plaintiff was employed with defendant contains a mandatory arbitration or grievance procedure for resolving the dispute arising under the pleadings in this case. A collective bargaining agreement is more than a contract. It is the stipulated code by which the plaintiff, through her union, and defendant have agreed to resolve even matters not wholly anticipated by the signatories; it covers the whole employment relationship. *Transportation-Communication Employees Union v. Union Pacific Railroad*, 385 U.S. 157, 161 (1966). Plaintiff's claims are not mere peripheral concerns of federal labor law or the collective bargaining agreement and are not matters deeply rooted in local feeling and responsibility. *See San Diego Building Trades Council, supra, at* 243-44. Thus, her claims are not exceptions to the preemption doctrine.

Throughout these proceedings defendant has continually asserted that plaintiff has failed to exhaust the grievance procedures of the collective bargaining agreement. *See, e.g.*, Defendant's Amendment by Interlineation, filed July 23, 1982. Such is a defense to a suit upon the collective bargaining agreement. *Vacca c. Sipes*, 386 U.S. 171, 184 (1967). Plaintiff has not specifically admitted non-compliance with the grievance procedure provisions of the collective bargaining agreement. Rather, she has sought to avoid the issue by alleging tort claims under Missouri law. The Court has previously determined that the national labor policy and the applicable national labor law, which requires application of the collective bargaining agreement to this dispute, preempts the state law that plaintiff invokes. The Court is without subject matter jurisdiction.

For these reasons, defendant's motions will be sustained.

DAVID D. NOCE

UNITED STATES MAGISTRATE

Dated this 4th day of February, 1983.